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## Part Four: Appendix

This *Appendix* includes lists of *some* of the principal cases dealing with takings and/or related due process issues and a short summary of the result in each case. These cases provide examples of how federal courts and Washington courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are many takings cases not discussed here, as well as several excellent law review articles on the subject.

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## 1. Summaries of Significant Takings Cases in the United States Supreme Court (Chronological Order)

### Before 1970

***Pennsylvania Coal Co. v. Mahon*,**  
**260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)**

*Regulations can “go too far” and may become the functional equivalent of an exercise of eminent domain that requires the payment of just compensation.*

This case begins the United States Supreme Court’s development of the concept of regulatory takings. Pennsylvania’s laws had prohibited coal mining that produced severe ground subsidence, which made it commercially impossible to mine coal in certain areas of the state. The Court rejected the notion that the constitutional requirement of just compensation was limited to traditional exercises of eminent domain (formal condemnation proceedings). Instead, the Court noted that regulatory activity can “go too far,” having such an impact on property that it is the functional equivalent of an exercise of eminent domain. The Court did not lay out clear standards as to when a regulatory action “goes too far.”

### 1970 – 1979

***Penn Central Transportation Co. v. New York City*,**  
**438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)**

*Takings claims are evaluated by examining and balancing three factors: (1) the economic impact of the regulatory action on the property; (2) the extent to which legitimate property use expectations exist and have been interfered with; and (3) the extent to which the government has used reasonable means to achieve an important public objective. When undertaking this evaluation, the court must consider the impact on the entire property owner’s interest at stake, not just the portion subjected to regulation.*

Grand Central Station was declared a landmark under New York City’s historic preservation ordinance. Penn Central, the owner, proposed to “preserve” the original station while building a 55-story building over it. The city denied the

construction permit. The Court rejected Penn Central's takings claim, explaining that the city ordinance served a valid public purpose and, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the station as it was. Responding to Penn Central's argument that the ordinance would deny it the value of its "pre-existing air rights" to build above the terminal, the Court held that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." The Court also applied a multi-factor test for evaluating a claim that specific government action has "taken" property. Courts must consider and balance three factors: (1) the economic impact of the regulation on the property; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action (whether it furthers an important interest and could have been accomplished by less intrusive means).

## 1980 – 1989

***Agins v. City of Tiburon*,  
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)**

*Regulatory actions may be a taking where they fail to advance a legitimate state interest or where they deprive property of all its value.*

*[In Lingle,<sup>2</sup> the Court abandoned the "substantially advance" test as part of takings analysis, recognizing it instead as an element of substantive due process.]*

The city adopted a zoning ordinance that limited property development to no more than five homes per parcel of land. Agins brought a takings claim alleging that the ordinance "completely destroyed the value of the property." The Court appears to have identified an alternative test for evaluating whether a regulation results in a taking. The Court held that a taking occurs only where the regulation (1) fails to substantially advance a legitimate state interest; or (2) denies an owner all economically viable uses of the land. The Court upheld the ordinance because it advanced a legitimate interest and did not deprive the landowner of all economic value.

***Loretto v. Teleprompter Manhattan CATV Corp.*,  
458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)**

*A physical invasion of property, no matter how slight, will categorically constitute a taking of that portion of the property occupied for the period of time that it is occupied.*

A state statute required landlords to allow the installation of cable television on their property. The owner of an apartment building challenged the statute, claiming a taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The Court held the statute was unconstitutional, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades

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<sup>2</sup> Cross-referenced decisions that are summarized in this *Appendix* are underlined.

and occupies property and that such an occupation is “qualitatively more severe” than a regulation on the use of property.

***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,***  
473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)

*A taking claim is not ripe and must be dismissed in two instances: (1) where the land use decision process has not been pursued, or is incomplete; and (2) where the landowner brings suit in federal court without first seeking compensation at the state level. The federal Just Compensation Clause does not require payment of compensation before a taking occurs, so long as a means of obtaining just compensation is provided.*

Over a course of years, the county first granted in part, then ultimately denied applications for permits to develop a golf course and residential area. The applicant alleged a taking. The Court held the claim was premature for two reasons: (1) the applicant had not sought variances that would have allowed it to develop the property according to its proposed plat and thus had not obtained a final decision as to the application of the ordinance to its property; and (2) the applicant had not used state procedures provided for obtaining just compensation. Tennessee had a statutory scheme allowing persons claiming a regulatory taking to file an inverse condemnation claim; the Court held the statutory scheme provided an adequate procedure for seeking just compensation, and the applicant could not claim a violation of the federal Just Compensation Clause until it used the state procedure and was denied just compensation. The Court also held that the Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, a taking; all that is required is that a “reasonable, certain and adequate provision for obtaining compensation” exists at the time of the taking.

***MacDonald, Sommer & Frates v. Yolo County,***  
477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)

*Where a land use planning agency retains some discretion to allow for meaningful use of the property, those opportunities must be explored before alleging that a final disposition exists regarding the permissible uses of the property.*

A developer appealed the county’s denial of a “tentative subdivision map,” claiming the denial deprived it of all economic use of its property. Following the reasoning in *Williamson County*, the Court held that until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed.

***First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California,***  
482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)

*The remedy for a regulatory taking of property is the payment of just compensation rather than simple invalidation of the regulation. If a regulation found to have “taken” property subsequently is repealed by the government, the property owner may be entitled to compensation for a “temporary taking” – the loss of value during the time the taking existed.*

When a flood destroyed a church campground, California responded with a moratorium prohibiting development in the flood plain area. The church sought damages, claiming its property had been taken. California argued that the only remedy available was to challenge the validity of the regulation and seek to have it overturned, but the Court held that just compensation is the appropriate remedy if property was “taken.” The Court also explained that if a statute effected a taking, the state could not avoid paying compensation by repealing the statute; compensation might be required for any loss of value during the time that the taking existed, that is for the “temporary taking.” The Court did not conclude there was a “temporary taking” in this case, only that the Just Compensation Clause allows compensation for a “temporary taking.”

***Hodel v. Irving,***

**481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)**

*The destruction of a “fundamental attribute of property” (the right to own, exclude others, dispose of property, or make at least some economic use of the property) will result in a taking.*

Portions of the Sioux Indian reservation that had been “allotted” to individual tribal members had become fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing the property. In 1983, Congress passed legislation which provided that any undivided fractional interest constituting less than two percent of a given tract’s acreage and earning less than \$100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. Tribal members challenged the statute. The Court noted that, under the balancing test traditionally applied to takings challenges, the statute might be constitutional. In this case, however, the character of the government action was “extraordinary” in that it destroyed “one of the most essential” rights of ownership: the right to transfer property, especially to one’s family. The Court held that such an action was a taking, regardless of the public interest that might favor the legislation.

***Keystone Bituminous Coal Association v. DeBenedictis,***

**480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)**

*Takings claims must be evaluated with respect to the entire parcel of land owned by the claimant, not just the portion affected by the regulation. Property may not be segmented into separate legal interests for purposes of evaluating a takings claim.*

Pennsylvania enacted a law requiring coal companies to leave certain amounts of coal in place to prevent subsidence of surface property. Keystone claimed a taking, alleging the law would require it leave up to 27 million tons of its coal un-mined, thereby effectively appropriating its coal for a public purpose. Keystone challenged the law on its face, rather than challenging its application in a particular set of facts. The Court held Keystone had a difficult burden of proof because legislation is presumed to be constitutional. The Court explained that legislation properly may regulate an activity to prevent severe impacts to the public, even if the activity has not traditionally been classified as a nuisance. Absent a showing that the legislation had a severe impact on Keystone’s entire property (the 27 million tons of coal was about two percent of Keystone’s holdings), the Court declined to invalidate the legislation. In response to

Keystone's arguments that its coal had been appropriated for a public purpose, the Court reaffirmed that takings law does not compensate a landowner for every loss in value. The Court refused to consider the coal left behind as a separate piece of property and affirmed that takings law evaluates the impact of regulation on the entire property held by the landowner, not just the portion being regulated.

***Nollan v. California Coastal Commission*,  
483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)**

*Permit conditions that extract something from a landowner must have some reasonable relationship (some "nexus") to an identifiable impact that the conditions seek to mitigate.*

The Nollans sought a permit to replace a bungalow with a larger house on their California oceanfront property. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass along their beach. The Court found this requirement to be a taking. The Court reasoned that it would have been a taking if the government had simply ordered the Nollans to give the public an easement outside of any permit process; the existence of a permit process and the extraction of an easement as a permit condition changes nothing unless the condition is related to some impact associated with the permit application. Even then, the permit condition is only valid if it substantially advances a legitimate state interest. The Court observed that if the Nollans' proposed house had blocked the public's view of the ocean from the street, a view easement perhaps would have been appropriate. But there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach. Accordingly, the Court held there was no reasonable relationship, or "nexus," between the permit condition and any public interest that might be harmed by the construction of the house. Lacking this nexus, the required easement was a taking of property.

**1990 – 1999**

***Lucas v. South Carolina Coastal Council*,  
505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)**

*A regulation that permanently deprives property of all economic value is a categorical form of taking that does not need to be evaluated using the Penn Central balancing test. If, however, the government can show that the regulated use of property would be barred under fundamental principles of property law or nuisance, there is no categorical taking even if the property is left without economic value.*

Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the state enacted legislation to protect its beaches, which prevented development of the lots. The parties stipulated that the parcels had no remaining economic value. The Court held that a regulation which "denies all economically beneficial or productive use of land" is categorically a taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court explained, however, that such categorical takings will be "relatively rare" and the usual balancing approach for determining takings, from Penn Central, will apply in most cases.



***Yee v. City of Escondido, California,***  
**503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)**

*Government regulation that affects the use of property, but that does not compel a landowner to involuntarily suffer the presence of the government or a third party, is not a categorical taking under Loretto.*

Yee challenged a rent control ordinance for mobile home parks that scaled rents back to 1988 levels and prohibited increases without city approval. Yee argued that the rent control provision, in combination with the state laws limiting the termination of rental agreements, forced the property to be used as a mobile home park with artificially low rents. He contended the result was a categorical taking similar to the physical invasion identified in the Loretto case. Observing that Yee voluntarily rented space to mobile homes and could get out of the business and convert the property to another use at any time, the Court held the ordinance was a regulation of property, not a physical invasion. The Court noted that a conventional regulatory taking analysis under Penn Central might be possible in this circumstance, but refused to apply that analysis because Yee's suit had only been litigated as a physical occupation claim.

***Dolan v. City of Tigard,***  
**512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 104 (1994)**

*Under Nollan, a permit condition that extracts something from a landowner must have some nexus to an identifiable impact. In addition, the scope of the condition must be "roughly proportional" to the impact being mitigated.*

The city approved a permit to expand a store and pave a parking lot, on condition that the business owner (1) dedicate a portion of her property for a public greenway along an adjacent stream to minimize flooding that would be exacerbated by the increased impervious surface, and (2) provide for a bicycle path intended to relieve traffic congestion. When the city denied her variance request, she alleged a taking. The Court distinguished most of its prior regulatory takings cases for two reasons: (1) they involved challenges to legislative comprehensive land use regulations, whereas this case involved an adjudicative decision to condition an application for a building permit on an individual parcel; and (2) the conditions imposed here did not simply limit use, but also required that the landowner deed portions of her property to the city. The Court found a sufficient nexus between the permit conditions and the impacts they targeted, under Nollan, then proceeded to consider whether the required dedication was "roughly proportional" to the impacts being mitigated. The Court held no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Finding that the city had not demonstrated why the floodplain could not be protected without depriving the landowner of her property, the Court held there was no evidence of a reasonable relationship between the business expansion and the required dedication for a public greenway. The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic caused by the expanded business, but it was troubled by the lack of evidence concerning the magnitude of any traffic impact. The Court remanded for further proceedings.

***City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,  
526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)**

*(1) If a takings claim can be brought in federal court and is raised as a 42 U.S.C. § 1983 civil rights claim, a jury may be used to evaluate the government's regulatory activity.*

*(2) The "rough proportionality" analysis set forth in Dolan is used only to evaluate regulatory exactions of some interest in property.*

After the city repeatedly failed to approve the development of a 37.6-acre parcel of land, based on the need to protect the habitat of an endangered butterfly, the plaintiffs sought compensation in federal court. The takings claim was lodged as a civil rights violation under 42 U.S.C. § 1983. At trial, a jury was used to consider two different takings theories – a categorical Lucas-type taking based upon a complete deprivation of all economically viable uses, and a takings theory based upon the Court's Agins analysis examining the nature of the government's actions. (Note: After Lingle, decided in 2005, this second form of takings analysis is no longer used in federal courts.) On appeal from a successful verdict, the city argued that it was improper to submit the takings question to a jury. The Court disagreed, noting that the jury was not being asked to scrutinize the question of whether the government's regulatory decisions were appropriate. The case had been raised as a civil rights claim and was litigated on the premise that the city's regulations were valid but had been applied inconsistently. The Court specifically refused to decide whether a jury might be used to determine takings claims brought outside of this context. In addition, the Court clarified that the rough proportionality test laid out in Dolan applies only when evaluating whether a property exaction amounts to a taking; it does not apply to regulatory actions that do not exact some property interest from the landowner.

2000 –

***Palazzolo v. Rhode Island*,  
533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)**

*(1) The mere fact that a government regulation was enacted before a regulated property was acquired does not mean the regulation will be treated as a background limitation on the use of the property that cuts off a taking claim, although the regulation may be considered in any Penn Central analysis that is performed. Only background limitations that traditionally have limited the use of property will cut off a regulatory takings claim.*

*(2) Where a regulation denies or limits the use of property, a takings claim will be ripe only if the landowner fully explores available variances or regulatory land use options or demonstrates that it would be futile to do so.*

A landowner was denied a permit to fill wetlands as part of a plan to build several waterfront homes. The landowner sued, alleging that the property had no remaining value and had been taken under the "total deprivation of all value" test laid out in Lucas. The planning agency responded (1) that the claim was not ripe because the landowner had not sought a variance; (2) that, because the landowner had acquired the property after the effective date of the regulation, the regulation constituted a pre-existing limitation on the use of property, thereby cutting off any

taking claim; and (3) that no Lucas claim existed because the evidence showed at least one home could be built on the unfilled portion of the property.

The Court reaffirmed that a case is not ripe where a planning agency retains the discretion to allow some alternate form of valuable development. In this case, while the applicable ordinance allowed for variances based upon a showing of “compelling public purpose,” the planning agency had already indicated that no compelling interest could be shown. On that basis, the Court held the appeal was ripe because it would be futile to make the landowner go through the motions of attempting to obtain a variance.

Agreeing that pre-existing property limitations may cut off a taking where the background limitation on property uses has always existed as a part of the law of property, the Court held this principle should not be used to treat newly enacted regulations as some bright line cut-off of any subsequent claim that the newly enacted regulations amount to a taking. Instead, the fact that a property owner may have acquired property with the knowledge that a previous regulation might preclude certain land uses could be weighed as part of the Penn Central balancing test when evaluating a landowner’s legitimate investment expectations. Finding that the entire property retained some value, the Court rejected the Lucas-based takings claim and remanded the case for a determination whether a taking had occurred, using the Penn Central balancing test.

***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,***  
**535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)**

*This opinion summarizes much of the Court’s prior takings analysis, including the principle that property is not segmented into components for purposes of a takings analysis (the “whole parcel rule”), and confirms that the Penn Central balancing test is the usual test for evaluating takings claims. Categorical takings claims are limited to the narrowly tailored exceptions set forth in Loretto (physical occupation) and Lucas (total deprivation of all economic value).*

The Tahoe Regional Planning Agency imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land use plan for the area. Landowners affected by the moratoria filed suit claiming a taking of their property without just compensation, alleging that their properties had been deprived of all value during the moratoria. The court refused to apply the categorical taking test of Lucas, explaining that a temporary deprivation of all value does not qualify as a taking under Lucas. For example, the normal delay associated with getting a permit does not give rise to a claim for any lost value. The Court held moratoria should be evaluated instead using the Penn Central balancing test, under which a moratorium could be treated as a taking if imposed for a long enough time or in a manner that was disproportionate to the legitimate planning needs of the agency.

The Court affirmed that takings claims normally are evaluated using the Penn Central balancing test. Categorical takings, such as the total deprivation of all value principle laid out in Lucas or the physical invasion principle laid out in Loretto, are rare and narrowly-tailored exceptions to normal takings analysis. The Court also affirmed that takings analysis must not segregate the regulated property into partial interests when evaluating the regulatory impact (e.g., a portion of time when the property may be used, a partial legal interest in the use

of the property, or a physical segment of the property being regulated). The property must be considered as a whole when evaluating the impact of regulation.

***Lingle v. Chevron U.S.A. Inc.*,  
544 U.S. 5288, 125 S. Ct 2074, 161 L. Ed. 2d 876 (2005).**

*The “substantially advances” formula articulated in Agins is not an appropriate test for determining whether a regulation effects a taking of property requiring just compensation, but is instead a principle associated with a substantive due process analysis.*

Concerned about the effects of market concentration on retail gasoline prices, the Hawaii Legislature passed a law limiting the rent that oil companies could charge dealers leasing company-owned service stations. Chevron sued, seeking a declaration that the rent cap was a taking of its property. Applying Agins, the district court held that the rent cap effected a taking in violation of the Fifth and Fourteenth Amendments because it did not substantially advance Hawaii’s asserted interest in controlling retail gas prices. The Supreme Court reversed, concluding the “substantially advances” formula is not a valid method of identifying compensable regulatory takings. Rather, it prescribes an inquiry in the nature of a due process test, which has no proper place in takings jurisprudence. A plaintiff seeking to challenge a government regulation as a taking of private property may proceed by alleging (1) a Loretto-based physical taking; (2) a Lucas-type total regulatory taking; (3) a Penn Central taking using the traditional balancing inquiry into the nature and effect of the government regulation; or (4) a land-use exaction violating the Nollan and Dolan reasonable relationship and proportionality standards.

***San Remo Hotel v. City and County of San Francisco*,  
545 U.S. 323 , 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005).**

*Full Faith and Credit considerations bar a Fifth Amendment takings claim from further litigation in federal court after a state court has analyzed the federal takings issue, found no taking, and denied compensation. It makes no difference that a federal suit would have been dismissed under Williamson County as unripe for failing to first proceed in state court.*

The San Remo Hotel was subject to a city ordinance requiring anyone wishing to convert residential hotel units into tourist hotel units to mitigate the loss of residential units by constructing new residential units, rehabilitating old ones, or paying an “in lieu” fee. When the hotel sought to convert all its rooms to tourist units, the city required it to pay a \$567,000 “in lieu” fee after all the units in the hotel were classed as residential. San Remo filed a state court action challenging the classification of its units, and a federal court action asserting that the ordinance worked a taking, both facially and as applied to San Remo. Relying on the ripeness principles in Williamson County, the Ninth Circuit held the as-applied challenge in federal court was not ripe because state court proceedings were available to seek just compensation. The court of appeals granted San Remo’s petition that it abstain from deciding the facial challenge until the state court case was resolved. The state court case then was expanded to include both facial and as-applied takings claims.

The California Supreme Court, analyzing the takings claims under both the federal and California constitutions, denied both takings claims. San Remo then attempted to litigate its takings claims in federal court. The federal district

court held that both takings challenges were barred by traditional principles of abstention: federal courts do not re-litigate claims resolved in state courts because they are not courts of appeal for such litigation. The United States Supreme Court affirmed, invoking the Full Faith and Credit clause of the United States Constitution, Art. IV, § 1; the full faith and credit statute, 28 U.S.C. § 1738; and traditional abstention principles. The Court explained that the fact that state court proceedings are not chosen, but instead are required to ripen federal takings claims, does not eliminate the preclusive effect of the prior determination so long as the state court proceedings fully litigate the takings issues.

***Kelo v. City of New London,***  
**545 U.S. 469 , 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).**

*Under the Fifth Amendment to the United States Constitution, the condemnation of private property and its transfer to private developers under a government-approved program for economic rejuvenation is evaluated using a broad definition of “public use” that defers in part to a legislative determination that the program is of public benefit.*

The city approved an integrated development plan designed to revitalize its ailing economy. The city purchased most of the property earmarked for the project from willing sellers, but it initiated condemnation proceedings against those owners who refused to sell. These property owners sued in state court, claiming the condemnation of their property as part of a plan to transfer the property to private developers did not constitute a “public use” of their property, as required in the federal Takings Clause. The Connecticut Supreme Court held the condemnation action was valid, and the United States Supreme Court affirmed. The Court held a government action serves a government use as long as it advances a public purpose. Relying on precedents extending back to the nineteenth century, the Court rejected the argument that “public use” literally means “use by the general public.” The Court looked instead to the state legislative determination as to whether the proposed use was a public use and held that in some circumstances economic development is a valid public use that can justify the condemnation of private property through eminent domain.

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2. **Summaries of Significant Washington State Takings Cases**  
**(Chronological Order)**

**1970 – 1979**

***Maple Leaf Investors, Inc. v. Department of Ecology,***  
**88 Wn.2d 726, 565 P.2d 1162 (1977)**

*A prohibition on construction for human habitation within a floodway is a valid exercise of the state police power, not a taking or damaging of private property.*

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations, which prohibited construction for human habitation within the floodway channel. Seventy percent of the property lay within the floodway channel. Considering a claim that the flood control regulations effected a taking, the Washington Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The court found the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety: the regulations prevented harm to persons who might otherwise live in the floodway, and barred the construction of structures that might break loose during a flood and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the court noted that it was nature, not the government, that placed Maple Leaf's property in the path of floods. The court rejected the taking claim.

***Department of Natural Resources v. Thurston County,***  
**92 Wn.2d 656, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980)**

*Restricting development density to protect bald eagle habitat is not a taking, so long as the county allows sufficient density for the owner to make a profitable use of its property.*

A developer leasing property from the state sought plat approval from the county for a proposed residential development. The county denied preliminary plat approval, finding the proposed development would interfere with eagle perching and feeding areas. The developer claimed a taking of private property. The Washington Supreme Court held it was not a taking, primarily because the county had indicated it would approve a less intensive development. (The county commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) The court held there was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

**1980 – 1989**

***Granat v. Keasler,***  
**99 Wn.2d 564, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983)**

*A city ordinance that conveyed perpetual occupancy rights to paying tenants effected a taking of property from houseboat moorage owners.*

Under a Seattle houseboat ordinance, the only reason a houseboat moorage owner could evict a paying tenant would be to use the moorage site for the owner's own non-commercial residence. A moorage owner appealed the ordinance. The Washington Supreme Court held the ordinance was a taking of private property without just compensation. The court's reasoning followed that of its earlier decision in *Kennedy v. Seattle*, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it effectively conveyed perpetual occupancy rights of a landowner's property to another person.

***Buttnick v. City of Seattle*,  
105 Wn.2d 857, 719 P.2d 93 (1986)**

*A historical preservation requirement in a city ordinance does not effect a taking if, considering the market value and income producing potential of the subject property, the requirement imposes no unnecessary or undue hardship on the plaintiff.*

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a parapet in a manner approximating the original design. The building owner claimed its property was taken without compensation. Following the United States Supreme Court's analysis in *Penn Central*, the Washington Supreme Court held the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income-producing potential of the building. The court rejected the taking challenge to the historic preservation ordinance.

***Valley View Industrial Park v. City of Redmond*,  
107 Wn.2d 621, 733 P.2d 182 (1987)**

*A reasonable delay in obtaining a required development permit does not give rise to a claim for a regulatory taking.*

A developer sought to build a phased development on a parcel that was the focus of efforts to conserve agricultural lands, which resulted in several delays during the permit approval process. The Washington Supreme Court found the task of obtaining a regulatory permit usually takes many months, and often several years, and concluded that reasonable delays do not result in a taking of property. The court also reiterated the Washington rule that, although the mere passage of time does not bar a landowner's right to seek just compensation for an alleged taking by inverse condemnation, that right may be subject to statutory time limits.

***Orion Corp. v. State*,  
109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988)**

*(1) A government prohibition on development actions that is reasonably tailored to protect the public interest in navigable waters under the Public Trust Doctrine does not constitute a regulatory taking.*

*(2) If a court concludes there is a regulatory taking, the decision lies with the legislative branch to decide whether to (a) cure the taking by amending the regulations, while providing compensation for a temporary taking; or (b) exercise eminent domain to complete a permanent taking, with appropriate compensation for the condemnation.*

The Orion Corporation was denied a shoreline permit to build a residential community on tidelands in Padilla Bay. Although the denial was issued pursuant

to a county shoreline ordinance, the Washington Supreme Court found the state was the proper defendant for Orion's regulatory takings claim; the court concluded the county was acting as agent for the state when it adopted its shoreline ordinance, because the ordinance became effective only when approved by the state. This case contains extensive discussions of the evolving notion of regulatory takings, although many of the principles discussed have been more fully developed since the time this opinion was issued. In addition to the interesting historical look at the development of the law, the opinion continues to be noteworthy for its conclusions (1) that private interests in navigable waters are burdened by public interests under the Public Trust Doctrine; and (2) the government may prohibit development actions that impair these public interests without effecting a taking and without violating principles of due process so long as the government's actions are reasonably tailored to prevent an impairment of the public's interests in the property.

***Unlimited v. Kitsap County*,  
50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988)**

*To avoid a taking, an exaction placed on a proposed development must serve a legitimate public purpose, must be reasonable, and must address a problem that arises from the proposed development.*

Unlimited sought a planned unit development approval to construct a convenience store on part of its property. The county approved the application subject to two conditions which required Unlimited to (1) dedicate a 50-foot right of way to provide commercial access to the next door property; and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Washington Court of Appeals, relying upon the United States Supreme Court's decision in *Nollan*, stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose." The court ruled that providing commercial access to the adjacent private property benefited a private person, rather than mitigating a public problem, and it found nothing in the proposed development that created a need to extend the arterial. The court held the conditions imposed by the county effected a taking.

***Estate of Friedman v. Pierce County*,  
112 Wn.2d 68, 768 P.2d 462 (1989)**

*A taking claim is not ripe for judicial review where the government retains some discretion to allow profitable uses of land.*

After the county denied a master application for a proposed development, the developer challenged the denial and alleged a taking. The superior court rejected both claims, dismissing the taking claim as not ripe for review because no specific project had been proposed. The Washington Supreme Court affirmed, holding that a taking claim is not ripe for adjudication where a regulatory agency retains some discretion to allow profitable uses of land. Without a final regulatory disposition that clearly shows the economic impact of the regulatory program, it is not possible for the court to assess the extent to which the regulation interferes with reasonable investment-backed expectations. Ripeness is a question for the judge, not the jury. If the regulatory agency raises as a defense the



landowner's failure to exhaust administrative remedies, the burden is on the landowner to persuade the court that futility excuses exhaustion. The burden is on the landowner to demonstrate it would be futile to pursue available development alternatives, and this is a substantial burden.

## 1990 – 1999

### ***Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990)**

*A land use regulation may be challenged either as a taking or as a violation of substantive due process.*

Presbytery purchased land on which it intended to build a church. The land contained a significant wetland, which occupied approximately one-third of the 4.5-acre parcel. Several years after the purchase, but before Presbytery had filed any development application, the county adopted an ordinance protecting wetlands, including the wetland on this parcel. Although the ordinance contained a reasonable use exemption, and despite the county's contention that a church could be built on the remaining two-thirds of the parcel, Presbytery alleged the wetlands portion of its property had been taken without just compensation.

This case marked the Washington Supreme Court's first attempt to provide an analytical framework for evaluating regulatory takings that incorporated United States Supreme Court cases and allowed for simultaneous or alternative substantive due process challenges. The state court's analysis first considered whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area rather than seeking to acquire some benefit for the public. If so, the regulation is not normally a taking. The constitutional validity of such a regulation then would be analyzed by considering whether it violates substantive due process.

If the regulation went beyond safeguarding the public's interests and worked to enhance a public interest, or if it destroyed a fundamental attribute of property ownership (the right to possess, to exclude others, or to dispose of property), then the regulation would be subject to analysis under the federal takings clause. A taking analysis would start by assessing whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the regulation does substantially advance a legitimate state interest, then the court would assess the extent of the economic impact on the property subject to the regulation, employing the balancing test laid out in *Penn Central*.

The usual remedy for a violation of substantive due process is invalidation of the ordinance. The usual remedy for a taking is just compensation. (But see the decision in *Manufactured Housing*, summarized below.)

The *Presbytery* test was re-worked in *Guimont v. Clarke* in response to subsequent United States Supreme Court holdings.

### ***Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765, cert. denied, 506 U.S. 1028 (1992) (*Sintra I*)**

*A substantive due process claim rests on a showing that interference with property rights was irrational or arbitrary, not on a showing that no viable use of the property remains. Where money damages are sought for a substantive due*

*process violation under 42 U.S.C. § 1983, there also must be a showing that the land use regulation is invidious or irrational.*

This is one in a series of related cases in which the plaintiffs applied to develop and change the use of hotels that previously had been used for low-income housing. In each case, Seattle imposed a housing preservation assessment under its housing preservation ordinance as a condition of development. While the applications were pending, the superior court invalidated this provision of the ordinance as an unconstitutional tax, and the Washington Supreme Court affirmed in *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987).

Sintra filed a lawsuit under 42 U.S.C. § 1983 seeking damages for the imposition of the housing preservation assessment on its proposed development, alleging both a violation of substantive due process and a taking of private property. The superior court dismissed the claim for damages, but the Washington Supreme Court reversed. Applying the *Presbytery* test, the court found the record insufficient to determine whether a taking had occurred and remanded also for a determination whether the ordinance placed so great an economic burden on the property that no viable use was available. If Sintra could make such a showing, then compensation for a taking would be available. See *Sintra II*.

Turning to the substantive due process claim, the court held that even though the housing preservation ordinance served a legitimate public purpose, it violated substantive due process because it was unduly oppressive, because the burden of providing low-income housing fell entirely on regulated landowners. Consistent with *Presbytery*, the court invalidated the assessment. To recover damages for this violation, however, the court held the plaintiff must prove the city acted invidiously or irrationally in imposing the assessment on the plaintiffs. The court remanded for a determination whether plaintiffs could make the required showing.

***Guimont v. Clarke*,  
121 Wn.2d 586, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176 (1994)**

*This opinion set forth the basic steps used by Washington courts to analyze challenges alleging regulatory takings or violations of substantive due process.*

In 1989, the Legislature adopted a statute that required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The statute was challenged facially by park owners on regulatory takings and substantive due process grounds. In its first takings case since the United States Supreme Court's decision in *Lucas*, the Washington Supreme Court reviewed its *Presbytery* analysis and re-worked the analysis slightly to accommodate the *Lucas* holding. Interpreting United States Supreme Court cases, the court mapped out a three-part regulatory takings analysis in Washington.

- (1) The court begins with a threshold analysis, which applies the classic categorical or "*per se*" takings tests, in which the government's actions are not weighed against their financial impact. The court asks whether the challenged regulation deprives the owner of all economic value (*Lucas*), causes a physical invasion (*Loretto*), or otherwise destroys a fundamental attribute of

property ownership (the right to own property, exclude others, or dispose of the property). If so, a taking has occurred unless, in a Lucas-type claim, the background property limitation principle applies. If not, the court proceeds to a second threshold analysis.

- (2) The second threshold analysis asks two subsidiary questions. First, does the regulation impinge upon a fundamental attribute of property ownership? (See Hodel and Agins.) Second, does the regulation do more to prevent harm to the public than to acquire some affirmative public benefit? If the regulation does not impinge upon a fundamental attribute of property ownership and if it manifestly prevents harm rather than acquiring a benefit for the public, then no taking exists and the taking analysis concludes. Otherwise, the court proceeds to the third part of the takings analysis. (Note that the harm/benefit test frequently is difficult to apply because it is difficult to distinguish between harm prevention and benefit acquisition.)
- (3) If the regulatory action impinges upon a fundamental attribute of property ownership, or if some public benefit is acquired, the court asks whether the regulatory action substantially advances a legitimate state interest. If the answer is no, the action is a taking. If the answer is yes, the Court then uses the balancing test set forth in Penn Central to evaluate the economic impact of the government's actions against the purposes and methods used by the government.

In this case there was no taking because the landowners could still evict tenants and change the use of the property. However, the court held the statute violated substantive due process because the potential financial impact of the statute's relocation reimbursement requirements would be unduly oppressive on park owners.<sup>3</sup> While the statute legitimately addressed the problem of declining space for mobile homes, the court concluded that the park owners were not more responsible for the problem than the general public and should not be required to bear the entire responsibility for achieving the stated public goal. Following the test in Presbytery, the court invalidated the Act.

***Margola Associates v. City of Seattle,***  
**121 Wn.2d 625, 854 P.2d 23 (1993)**

*To prove a regulation results in a physical taking, a landowner must show the regulation requires the landowner to submit to the physical occupation of his or her land.*

Apartment house owners challenged a city ordinance that required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. Applying the analysis from Guimont v. Clarke, the court held the ordinance did not effect a regulatory taking, finding the city had a legitimate interest in ensuring compliance with its housing code and concluding the ordinance neither deprived

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<sup>3</sup> The test for substantive due process set out in Presbytery is (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. As in Guimont v. Clarke, the analysis usually turns on the "unduly oppressive" part of the test.

the owners of all economic value nor amounted to a physical invasion. Relying on the United States Supreme Court decision in *Yee*, the Washington Supreme Court rejected the argument that the ordinance's restriction on eviction effectively compelled a physical invasion of property, explaining that the owners had voluntarily rented the units and could continue to evict tenants by paying a small fee, so the owners' right to exclude others was not destroyed. The court also found the small annual fee (one-half of one percent of the average rent) was not an undue burden on the owners and held the owners were not deprived of substantive due process.

***Guimont v. City of Seattle*,  
77 Wn. App. 74, 896 P.2d 70, review denied, 127 Wn.2d 1023 (1995)**

*A prohibition on one type of use does not effect a regulatory taking if other economically viable uses remain available.*

While the Washington Supreme Court's review was pending in *Guimont v. Clarke*, the Legislature amended the statute at issue by scaling back the required financial contributions to the relocation program. Instead of challenging the amended statute, the plaintiffs in this case challenged a Seattle ordinance that reserved spaces in mobile home parks solely for mobile homes, excluding "recreational vehicles." Both facial and "as applied" taking claims were alleged, together with a substantive due process claim. The Washington Court of Appeals found the record insufficient to decide the as-applied claims and rejected the facial claims. Applying the *Guimont v. Clarke* analysis, the court held (1) there was no categorical taking because the law did not prevent all economically viable use of the property and because there was no physical invasion (using reasoning similar to that used by the United States Supreme Court in *Yee*); (2) no fundamental property attribute was destroyed, derogated, or implicated; (3) the showing of financial impact was insufficient to support a general conclusion that the ordinance unfairly disrupted the landowners' investment-backed expectations; and (4) the legislation advanced a legitimate state interest in dealing with declining opportunities to locate mobile homes that are occupied by elderly and low-income families. The court concluded the ordinance had "minimal" impact on the mobile park owners and did not violate substantive due process.

***Luxembourg Group, Inc. v. Snohomish County*,  
76 Wn. App. 502, 887 P.2 446, review denied, 127 Wn.2d 1005 (1995)**

*To meet Nollan's "essential nexus" requirement, an exaction of property must address some problem arising from the development under consideration.*

As a condition for approving a subdivision, the county required the developer to grant an easement to a neighboring landlocked property owner. The Washington Court of Appeals held the condition was a taking, because there was no essential nexus between the easement requirement and any adverse impact of the development (see *Nollan*). The court reasoned that the interior parcel would be land-locked regardless of whether the developer's property was subdivided or not.

***Sparks v. Douglas County*,  
127 Wn.2d 901, 904 P.2d 738 (1995)**

*The government must demonstrate that the exaction it imposes to mitigate development is "roughly proportional" to the impact of the development.*

As a condition for approval of a development plat, the county required the developer to dedicate several rights of way for future street improvements. The developer conceded there was a “nexus” between the condition and the identified impact of the proposed development, but challenged the amount of the dedication as a taking, claiming it was not specifically proportional to the identified impact. Applying the “rough proportionality” test of *Dolan*, the Washington Supreme Court concluded the county did not need to show exactly proportional mitigation requirements, just a roughly proportional calculation of impact and mitigation. So long as the county had some valid reasoning and did not rely upon merely conclusory findings, the mitigation condition could be upheld.

***Ventures Northwest Ltd. Partnership v. State,*  
81 Wn. App. 353, 914 P.2d 1180 (1996)**

*A plaintiff alleging a regulatory taking must be able to demonstrate the alleged deprivation of property actually was caused by the government’s regulation or action.*

Ventures sought to develop property in a flood plain and applied for permits from both the state and the federal government. The federal permitting process proved difficult and a federal Corps of Engineers permit was denied for several reasons, including opposition by various federal agencies, the state Department of Ecology’s refusal to issue water quality certifications, and Ventures’ repeated failure to work through various permitting information concerns. While the federal permit decision was pending, the county denied a grading and filling permit. Ultimately, the county began foreclosure proceedings against Ventures’ property for nonpayment of assessments and taxes. Ventures filed takings claims against the state and the county. Ventures alleged the state’s actions had caused the federal permit process to fail, and it alleged the county’s permit denial contributed to its inability to develop its property. The Washington Court of Appeals rejected the claims, explaining that a taking claim must be premised upon “causation in fact” – the plaintiff must be able to demonstrate the alleged loss would not have occurred “but for” the government’s actions. The court concluded the federal government had a basis to deny the permits before the state refused to provide the required water quality certification. The court also concluded the county’s denial of the permit was reasonable because Ventures failed to satisfy a properly imposed condition and because Ventures failed to show that the permit denial resulted in any loss of economic viability.

***Schreiner Farms, Inc. v. Smitch,*  
87 Wn. App. 27, 940 P.2d 274 (1997)**

*A restraint on the sale of property is not a taking where it is not accompanied by some physical restriction on the property.*

Schreiner Farms operated an 800-acre game farm that bred and raised several exotic animal species, along with native elk. To protect native wildlife from disease, the state adopted regulations banning the importation, possession, or sale of elk, with certain exceptions, including a limited right to continue possession of previously-acquired elk. Schreiner Farms sued for compensation, alleging its elk and other property were taken by the regulations. The Washington Court of Appeals held the regulations did not destroy or derogate a fundamental attribute of property because Schreiner Farms retained the right to possess the elk and could dispose of them so long as they were transported out of state. The

regulations imposed a restraint upon the range of options for disposing of the elk (including a bar on in-state sales), but the court, relying on *Andrus v. Allard*, 444 U.S. 51 (1979), held the restraint on sale of elk was not a taking where there was no accompanying physical property restriction, such as a prohibition on possession or transportation of the elk.

***Sintra, Inc. v. City of Seattle,*  
131 Wn.2d 640, 935 P.2d 555 (1997) (*Sintra II*)**

*A plaintiff who prevails on a regulatory takings claim is entitled to payment of interest on the value of the property taken for the time period between the taking and the ultimate payment of compensation.*

After *Sintra I* remanded to the superior court, a jury found a taking had occurred and awarded compensation to Sintra, but the jury denied Sintra's claim for money damages under 42 U.S.C. § 1983 flowing from the city's violation of substantive due process, finding the violation had not proximately caused Sintra any harm. The Washington Supreme Court affirmed.

*Sintra II* involved questions about the appropriate amount of interest to be paid as part of compensation for a taking. The court explained that just compensation should be sufficient to put the property owner into the same position monetarily as the owner would have been had the property not been taken. The value of just compensation is calculated as of the time the taking occurs. In an inverse condemnation or regulatory taking, however, there is a delay between a taking and the judicial determination that compensation should be awarded, such that the payment of interest is necessary to compensate the owner for the lost use of the monetary value of a taking. The court held that simple interest at the statutory rate should be awarded, unless there is evidence that such an award would not afford just compensation. In this case, the trial court erred by awarding compound interest.

***Snider v. Board of County Commissioners of Walla Walla County,*  
85 Wn. App. 371, 932 P.2d 704 (1997)**

*A court cannot force a legislative branch of government to exercise the power of eminent domain.*

As a condition for approving a preliminary plat for a proposed subdivision, the county required that an existing road be widened, which would require the developer to acquire a right of way from an adjacent landowner. The superior court upheld the determination that a widened road was needed to serve the proposed development, but held it was arbitrary and capricious for the county to require the developer to obtain the right of way. The superior court modified the condition to require the developer to deposit money with the county sufficient to acquire the right of way and construct the necessary improvements, effectively requiring the county to use its eminent domain power to acquire the right of way. The Washington Court of Appeals reversed. It held the original condition was proper given the impact of the development. More fundamentally, under the doctrine of separation of powers, the court held the superior court lacked the power to modify the condition to require the county to exercise its power of eminent domain.

**Burton v. Clark County,**  
91 Wn. App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999)

*To avoid constituting a taking, an exaction placed on a proposed development must solve or tend to alleviate an identified public problem.*

As a condition for approving a short plat, the county required the applicant to dedicate right of way and construct a road, curbs, and sidewalks. Applying the principles of *Nollan* and *Dolan*, the Washington Court of Appeals held that, before a government agency may condition a permit using an exaction, it must identify a public problem – not just a problem affecting some private landowners – and must be able to conclude that the proposed development will exacerbate this public problem. The exaction must solve or tend to alleviate the identified problem that is caused by the development and it must do so in a roughly proportional manner. The Washington Court of Appeals found the proposed subdivision would aggravate certain public problems related to traffic congestion problems, but it concluded the road exaction would contribute to the solution of this problem only if it were extended across another undeveloped parcel. Because there was no evidence any such extension might occur, the court held the county had not met its burden of showing the condition would help solve the identified problem.

**Phillips v. King County,**  
136 Wn.2d 946, 968 P.2d 871 (1998)

*No inverse condemnation claim lies against a county that issued a permit to a private development that has a design defect leading to surface water flooding of adjacent property, unless the government is acting as a direct participant in the development that caused the flooding.*

A developer proposed a drainage plan that constructed a discharge system on adjacent county right-of-way even though its engineers warned of liability to adjacent landowners because of soil conditions. The drainage plan was vested under an old code and did not meet the standards of the existing code. The county approved the plan notwithstanding concerns raised by Phillips, whose property lay on the opposite side of the county right-of-way.

Soon after the drainage system was built, Phillips sued both the developer and the county, claiming the system resulted in flooding of Phillips' property. Phillips alleged the county's approval of the drainage system resulted in an inverse condemnation of a portion of Phillips' property. The Washington Supreme Court rejected the inverse condemnation claim. The court explained that a claim for inverse condemnation from surface water flooding is possible where a county artificially collects and discharges water onto surrounding property in a manner different than from the natural flow, but no inverse condemnation arises (1) where the county merely permitted a development that causes a surface water problem when constructed or (2) where the county later took ownership of the drainage system and the surface water problem was not due to the county's poor maintenance but to the developer's poor design. The court held, however, that when the county allowed the drainage system to be built on county land it potentially became part of the problem by allowing its land to be used in an allegedly improper manner. The court remanded to the trial court to determine if the county had participated in a surface water invasion of the neighbor's property.

***Kahuna Land Co. v. Spokane County,***  
**94 Wn. App. 836, 974 P.2d 1249 (1999)**

*Conditions imposed on development that are reasonably necessary for public health and safety do not effect a taking. Conditions made necessary by the character of the property are not unduly oppressive and do not violate substantive due process.*

As a condition for approving a preliminary plat for a proposed subdivision, the county required the construction of an access road and sewer across an adjacent parcel owned by the federal government. Alleging the cost of this condition was so great it would take all profit from the development, Kahuna claimed a taking of property and a violation of substantive due process. The Washington Court of Appeals rejected Kahuna's categorical taking claim, applying *Guimont v. Clarke* and finding the property retained value and had not been physical invaded. Finding the access and sewer requirements imposed by the county were reasonably necessary for public health and safety and that no public benefit had been acquired, the court found it unnecessary to undertake a *Penn Central* balancing analysis. The court also rejected the substantive due process claim, concluding the conditions were reasonably necessary to a legitimate public purpose, and the cost of the conditions had more to do with the remoteness of the site than the county's choices as to conditions.

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***Manufactured Housing Communities of Washington v. State,***  
**142 Wn.2d 347, 13 P.2d 183 (2000)**

*Under the Washington Constitution, private property may be taken only for public use, and not for private use (with certain exceptions). Public benefit, by itself, does not constitute public use.*

To address problems facing low income and elderly mobile home tenants as space for mobile homes became increasingly scarce, the Washington Legislature enacted a statute that gave qualified mobile home tenant organizations a right of first refusal to purchase mobile home parks when the landlord decided to sell the land. The mobile home park owners complained that granting a right of first refusal would impair their power to negotiate the best sale of their property and that the enactment of the legislation took their property. The Washington Supreme Court agreed. It first conducted a *Gunwall* analysis<sup>4</sup> and held the opening portion of article I, section 16, of the Washington Constitution, which prohibits government from taking private property for a "private use," provides greater protection than the federal constitution.

The court concluded the statute impinged on the "right of first refusal," which the court found to be a significant interest in property. A finding that fundamental property interests have been impinged upon normally leads to a *Penn Central* analysis, under the test set forth in *Guimont v. Clarke*. In this instance, however, the statute transferred the right of first refusal from the mobile home park owner to a third person—the mobile home tenants' association, and the court found this transfer to be functionally equivalent to the exercise of eminent domain, and therefore a taking of property. Rather than awarding compensation,

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<sup>4</sup> *Gunwall v. State*, 106 Wn.2d 54, 720 P.2d 808 (1986).



however (which the statute provided in full measure), the court invalidated the statute, holding that the statute violated the first portion of article I, section 16. The court explained that although the statute might provide a public benefit, mere public benefit does not constitute public use for purposes of article I, section 16.

***Eggleston v. Pierce County,***  
**148 Wn.2d 760, 64 P.3d 618 (2003)**

*Police power and eminent domain power are separate and distinct powers of government. The duty to provide evidence in a criminal case, which involves the police power, does not give rise to a taking of property.*

Mrs. Eggleston's home was rendered uninhabitable when county police removed a load-bearing wall to preserve evidence of a crime committed by her adult son. The police action was taken pursuant to a search warrant and an order to preserve evidence. While the court struggled with the severe impact sustained by Mrs. Eggleston, it concluded that some government actions are pure exercises of police powers and cannot be equated with the power of eminent domain. The preservation of evidence for criminal proceedings is such a power. The court left open the possibility that Mrs. Eggleston may have other legal means to address the manner in which the police acted, but concluded that the matter should not be analyzed as a taking of property.

***Edmonds Shopping Center Associates v. City of Edmonds,***  
**117 Wn. App. 344, 71 P.3d 233 (2003)**

*A reasonable exercise of the police power that does not destroy a fundamental attribute of ownership or impose a private burden for a public benefit is not a taking.*

The city granted Marty's Public House a gambling permit to expand its card table gambling operation and a building permit to expand its building. Shortly thereafter, the city adopted an ordinance banning cardrooms. Marty's claimed the ordinance was not a legitimate exercise of the police power and effected a taking. The Washington Court of Appeals rejected that claim, holding the regulation of gambling is a reasonable exercise of the police power to protect the public health, safety and welfare, and the ordinance neither destroyed a fundamental attribute of ownership nor imposed a private burden for a public benefit. The court also rejected Marty's substantive due process claim, concluding an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm and noting that Marty's building could be used for other purposes.

***Saddle Mountain Minerals, L.L.C. v. Joshi,***  
**152 Wn.2d 242, 95 P.3d 1236 (2004)**

*Before a property owner can raise a regulatory taking claim, there must be a final governmental decision regarding the application of the regulation to the property at issue.*

In 1993, the city rezoned a parcel owned by Joshi to high density residential, a designation that does not allow mining. Thereafter, Saddle Mountain Minerals purchased the mineral estate in Joshi's parcel. A year later, Joshi began developing the property, using sand and gravel from the property to grade an off-site access road. Saddle Mountain sued Joshi, claiming damages for the off-site use of the sand and gravel, part of the mineral estate of the property.

Joshi defended by arguing that the mineral estate had been destroyed when the zoning was changed and that Saddle Mountain's predecessor should have filed a takings claim against the city.

The Washington Supreme Court rejected Joshi's defense, holding that the city's ordinance did not destroy Saddle Mountain's mineral rights. The court explained (1) it was inappropriate to apply takings law to a dispute between private parties; (2) a takings claim against the city was not ripe because there was no final government decision applying the zoning regulations to the site, since Saddle Mountain had never applied for a variance or waiver from the mining prohibition in the ordinance; and (3) there was no determination by a fact finder of the remaining value of Saddle Mountain's mineral rights.

***In the Matter of Property Located at: 14255 53rd Ave S., Tukwila, King County, Washington,***  
**120 Wn. App. 737, 86 P.3d 222 (2004), review denied, 152 Wn.2d 1034 (2004), cert. denied, 125 S. Ct. 1862 (2005)**

*Government action necessary to avert a public calamity does not give rise to a takings claim.*

Washington State declared an emergency when it discovered that plants in a commercial nursery were infested with the citrus longhorned beetle. The unchecked spread of this beetle could have devastating effects on Washington's trees and native forests. The primary control strategy approved by a panel of scientists required the destruction of potential host trees within a certain radius of the infested nursery. Three homeowners whose trees were to be destroyed alleged this control strategy was a taking of their property and that compensation had to be paid in advance of any control activities. The Washington Court of Appeals disagreed, holding (1) the destruction of potential host trees was not a physical invasion leading to a taking claim; (2) government action undertaken to avoid a public disaster is not an appropriation of private property for public use and is not susceptible to a takings analysis; and (3) that there is no private right to maintain property in a condition that would lead to a public nuisance, so that the government may abate the nuisance without facing a taking claim.

***Paradise Village Bowl v. Pierce County,***  
**124 Wn. App. 759, 102 P.3d 173, review denied, 154 Wn.2d 1027 (2005)**

*A regulation that does no more than protect the public against a specific harm does not effect a regulatory taking.*

Paradise challenged a county ordinance that eliminated social card gaming unless it was conducted for charitable or non-profit purposes, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Applying the threshold questions in *Guimont v. Clarke*, the court concluded (1) the ordinance had not destroyed a fundamental attribute of property, including the ability to make some profitable use of the property, since the plaintiff could continue to use its property as a bowling alley and restaurant; and (2) the ordinance was designed to protect the public, by regulating against social ills associated with unrestricted gambling, rather than to acquire some public benefit. Because the threshold questions were answered in the negative, there was no need to undertake the *Penn Central* balancing test to evaluate whether there might be a taking based upon the magnitude of the economic impact and the means used to regulate the property.

In rejecting the substantive due process claim, the court concluded an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm.

***Dickgieser v. State,***  
**153 Wn.2d 530, 105 P.3d 26 (2005)**

*(1) A taking may exist for damage to private property that is reasonably necessary for a public use to proceed.*

*(2) An alleged governmental tort, such as negligence, does not become a taking simply because the government is the alleged tortfeasor.*

Logging on state land resulted in flooding damage to Dickgieser's property, which lay down slope from the state land. Dickgieser claimed the state's actions constituted an inverse condemnation of his property, but the trial court granted summary judgment to the state, ruling that no taking occurred because the logging of state lands was not a public use. The Washington Supreme Court reversed. The court held damage to private property that is reasonably necessary to log state lands is for a public use and requires compensation under article 1, section 16 of the Washington Constitution. The court remanded to the trial court for a determination whether the damage to Dickgieser's property was reasonably necessary for logging of state land, and whether the state's logging activity concentrated and gathered water into artificial channels or drains and discharged it onto Dickgieser's land in quantities greater than or in a different manner than the natural flow.

The court rejected the state's argument that Dickgieser's claim was no more than a negligence claim against the state, finding that Dickgieser in fact had raised a taking claim. The court reiterated, however, that alleged governmental torts, such as negligence, do not become takings simply because the government is the alleged tortfeasor.

***Tiffany Family Trust Corp. v. City of Kent,***  
**155 Wn.2d 225, 119 P.3d 325 (2005)**

*The Legislature may impose time periods and other statutory limits on takings claims.*

In 1986, Tiffany entered into a mitigation agreement with the city to pay a proportional amount of the related cost of improvements to nearby roads, to mitigate impacts associated with an application for a conditional use permit. Rather than requiring any payment at the time the permit was granted, however, payment for the improvements was to be made pursuant to the formation of a local improvement district (LID). When the LID was formed in 1998, however, the assessment was 15 times the estimate made in 1986. Tiffany sued, alleging a taking of property, a violation of substantive due process, and a civil rights claim under 42 U.S.C. § 1983. Tiffany asked the court both to declare the assessment void and to award compensation for a taking. The trial court dismissed the claims, ruling that the statutory time period for attacking the assessments had passed, and that Tiffany could not get around that bar by collaterally attacking the assessment using the same arguments disguised as constitutional claims. The Washington Supreme Court affirmed. While LID assessments in excess of special benefits received are prohibited and result in a taking, a property owner who wishes to challenge a LID assessment must do so before the final assessment

roll is confirmed, after which the LID is deemed conclusively correct and may not be challenged.

***HTK Management, L.L.C. v. Seattle Popular Monorail Authority,*  
155 Wn.2d 612, 121 P.3d 1166 (2005)**

*If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even where the court believes an erroneous conclusion has been reached.*

The Seattle Monorail Project (SMP) brought an action to condemn a parking garage for use as a monorail station. HTK, owner of the garage, challenged the condemnation. The parties agreed that SMP needed a portion of the property for the station itself and the remainder of the property for staging during construction, after which the excess property would be sold.

As a threshold question, HTK claimed SMP lacked authority to condemn private property. The Washington Supreme Court found that SMP was a creature of the City of Seattle, so that the city's condemnation authority and procedures applied to SMP.

HTK contended SMP should be limited to acquiring a multiyear lease on the portion of the property needed only during construction. The court upheld SMP's finding that it needed the entire property, holding that determinations about the type and extent of property interest necessary to carry out a public purpose are legislative questions to which courts give deference. If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even when there is room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

***City of Des Moines v. Gray Businesses, LLC,*  
130 Wn. App. 600, 124 P.3d 324 (2006)**

*A taking does not arise from the regulation or denial of a property use that is contingent on state or local regulations. Such use is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership, and the regulation or denial of that use does not derogate a fundamental property interest.*

When the owner of a mobile home park failed to provide the city with a site plan of its park within the time required by ordinance, the city notified the owner that it would no longer issue permits allowing mobile homes to come onto the site to replace those that moved away. The owner subsequently claimed a regulatory taking, arguing the right to lease vacant spaces was at least as important than the right of first refusal at issue in Manufactured Housing. The Washington Court of Appeals disagreed, holding the right to operate as a mobile home park was not a fundamental attribute of ownership. Manufactured Housing dealt with an owner's inherent right to sell or lease its property to anyone it chooses. By contrast, the right to use and lease property for mobile homes is not inherent, but derived from and limited by state and local laws. The ability to use or lease property for mobile home is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership.

***Central Puget Sound Regional Transit Authority v. Miller,***  
**156 Wn.2d 403, 128 P.3d 588 (2006)**

*Compliance with statutory notice requirements constitutes adequate notice of a public hearing concerning the anticipated condemnation of property.*

Sound Transit provided notice of a public meeting to discuss possible sites for condemnation by posting notice and its agenda on its web site, but nowhere else. One month later, Sound Transit determined to condemn Miller's property. At the public use and necessity hearing for the condemnation, Miller claimed notice of the prior public meeting was inadequate. The Washington Supreme Court rejected Miller's claim, finding Sound Transit had satisfied its statutory notice requirement. Sound Transit was required to use the same methodology as first class cities for giving notice of public meetings where condemnation is discussed.

***Peste v. Mason County,***  
**133 Wn. App. 456, 136 P.3d 140 (2006)**

*To allege successfully that a statute on its face effects a taking by regulating the permissible uses of property, a landowner must show that the mere enactment of the regulation denies all economically viable use of the property.*

Peste appealed a downzoning of his property, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Relying primarily on Guimont v. Clarke, the court examined first whether the downzone on its face destroyed a fundamental attribute of property ownership, in this case the right to make some economically viable use of the property. To prove that a statute on its face effects a taking by regulating the permissible uses of property, the landowner must show that the enactment of the regulation denies the owner all economically viable use of the property. The court concluded Peste presented no evidence showing a facial taking. Peste's as-applied takings claim also failed for lack of evidence. On the record before it, the court rejected Peste's substantive due process claim, finding the downzone was not unduly oppressive.

***Wallace v. Lewis County,***  
**134 Wn. App. 1, 137 P.3d 101 (2006)**

*In some circumstances, the passage of time may bar an inverse condemnation claim.*

Neighbors filed nuisance claims against a landowner who operated a tire disposal business, and inverse condemnation and other claims against the county for using the business for tire disposal. The trial court dismissed all claims and the Washington Court of Appeals affirmed. Insofar as the inverse condemnation claim rested on the fact that tires spilled onto one neighbor's property, the court held the tires had been placed on the neighbor's property for so long they created a prescriptive easement, so that the passage of time barred an inverse condemnation claim. The court also held the inverse condemnation claim failed because the county's tire-disposal activities were not related to a public use or a public benefit; the county acted as a private party who contracted with another private party for disposal of its own tires.

